

Metal Container Corporation and Steven Wilson, and Kurt Bauerle, and Peter Murray. Cases 2–CA–28303 and 2–CA–28917

June 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 12, 1998, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's cross-exceptions and a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Metal Container Corporation, New Windsor, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Mindy Landow, Esq., for the General Counsel.

James Blue and Wayne Helsby, Esqs. (Allen, Norton & Blue, Esqs.), of Tampa, Florida, for the Respondent.

Robert Kundin, Esq., of New Windsor, New York, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge, a first amended charge, and a second amended charge in Case 2–CA–28303 filed by Steven Wilson, an individual, and Kurt Bauerle, an individual, on March 28, June 7, and July 31, 1995, respectively, and based upon a charge in Case 2–CA–28917 filed by Peter Murray, an individual, on November 20, 1995, against Metal Container Corporation (Respondent), a

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We note that the Board has been administratively advised that Charging Party/discriminatee Steven Wilson has reached a settlement with the Respondent regarding his reinstatement and backpay, and has declined an offer of reinstatement. Any issues regarding the settlement and reinstatement offer, the Respondent's reinstatement and backpay obligations in light of that settlement offer, and the Respondent's defenses to any reinstatement obligation, may appropriately be addressed in compliance.

consolidated complaint was issued on July 24, 1997, against Respondent.

The complaint alleges essentially that Respondent discharged Bauerle, Murray, and Wilson because of their activities in behalf of the United Steelworkers of America (the Union). Respondent's answer denied the material allegations of the complaint, and on December 18 and 19, 1997, and March 9, 10, and 11, 1998, a hearing was held before me in New York City.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an affiliate of the Anheuser-Busch Company, is a corporation, having a place of business in New Windsor, New York. Respondent is engaged in the production and nonretail sale and distribution of metal cans and containers. Annually, Respondent sells and ships from its facility goods valued in excess of \$50,000 directly to points outside New York State. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's Newburgh, New York facility operates 24 hours per day, manufacturing beer and soda cans. Its approximately 175 employees (called team members) are assigned to one of four crews, each of which has a supervisor and a superintendent.

The plant manager is Tony Bhalla, and Brenda Danforth was the human resources manager at the facility.

The employees in Respondent's facilities in Jacksonville, Florida, and Columbus, Ohio, are represented by the Union. Respondent operated its Newburgh facility as a "proemployee, nonunion" operation.

In about July 1994, the Union began organizing Respondent's employees at the Newburgh facility. A petition was filed on August 18, and an election was held on October 6, which the Union lost. Respondent waged a campaign in which it sought to persuade employees to vote against the Union. In-plant, and offsite meetings were held, and speeches and videotaped messages by Respondent's corporate officials were presented.

Bauerle, Murray, and Wilson were active in the campaign. They signed cards for the Union and distributed authorization cards and union literature inside and outside the plant. They also wore union hats, shirts, and buttons at work. Respondent's witnesses testified that others also wore such garb.

Respondent stipulated that it had knowledge that Bauerle, Murray, and Wilson engaged in union activities during the 1994 campaign. Employee Justin Connolly testified that "quite a few" employees, including Bauerle, Murray, and Wilson, John Kovacs, Steve Kwanda, and Steve Wilk "spearheaded" the union drive.

Regarding evidence of Respondent's animus toward the Union during that organizational drive, employees Kevin Bell and Justin Connolly testified that they heard Mark Stafford, Re-

spondent's director of can operations, tell employees that if the facility became unionized, he would shut it down.

Connolly, who was opposed to the Union's effort, testified that during the campaign, he told Plant Manager Tony Bhalla that Bauerle was distributing union cards and other materials, and he told Supervisor Leon Long that Murray and Wilson were distributing such items. Bhalla and Long replied that they were aware of that. Connolly further stated that he wore an antiunion button which bore the initials "FTU." He told Bhalla that the letters stood for "fuck the union—fire the useless." According to Connolly, Bhalla told him that "we know who they are and we're gonna get them." It should be noted that Connolly's pretrial affidavit, given only 1 week before the hearing, stated that Bhalla remarked, "[W]e should fire them all." Bhalla testified that he said nothing to Connolly about firing employees who supported the Union, and that Connolly's explanation of "FTU" was "fire the useless."

Murray testified that following the Union's election loss in October 1994, a new campaign began in the summer and early fall of 1995. He solicited cards for the Union both on and off the plant premises. Danforth testified that she saw union literature (dated in early August 1995) that was distributed in the plant, and she was told by employees that three named employees, none of whom were the Charging Parties, were putting union cards in the toolboxes of their colleagues. She relayed this information to the superintendent of that crew, and he spoke to the three about Respondent's rules concerning solicitation and distribution. Those three men are still employed by Respondent, and one was promoted.

Jerry Riley, Respondent's vice president of human resources, testified that he was aware that union activity was taking place in the plant in 1995, but had no knowledge of any card signing during that time. Respondent denied knowledge that the Charging Parties engaged in union activities during this 1995 campaign. That campaign was short lived, and apparently no further union activities occurred beyond September 1995.

B. Respondent's Discipline Policy

Respondent has a workplace violence policy which states that it is committed to providing its employees with a workplace that is free of intimidation, violence and threats of violence, and that it will not tolerate acts or threatened acts of violence by employees against fellow employees. The policy states that anyone who violates it is "subject to disciplinary action up to and including immediate discharge." Danforth said she met with employees in December 1994 and January 1995 and reviewed that policy with them.

In January 1995, Respondent instituted a written progressive discipline policy with the following steps: counseling, verbal warning, written warning, decision-making leave (suspension with the employee required to write a letter stating the ways in which he will correct his improper conduct), and termination. The policy notes that serious misconduct is not subject to progressive discipline, but may cause the employee to be subject to immediate discipline, up to and including termination. An example given was "physical violence or threats of physical violence to another employee."

C. Steve Wilson

1. Wilson's union activities

Wilson was employed for 6-1/2 years as a production technician. His 1993 performance evaluation has essentially "good" ratings. As set forth above, Wilson was active in the 1994 union

campaign, distributing pamphlets in front of the plant and in the breakroom, addressing meetings of employees, and wearing union clothing. He stated that while distributing union material in front of the building, Supervisor Long remarked that he was "right in front of the plant." Wilson responded that this is what he has to do. Long replied in kind: "A man's got to do what a man's got to do."

Wilson testified that on the day of the election, he asked Supervisor Sam Federico whether there would be any retaliation by Respondent if the Union lost the election. Federico replied that he did not know if there would be retaliation, but Wilson should not ask for any favors.

Federico testified that 15 or more employees, in his crew of 42, which included Wilson, wore union clothing. He denied the conversation attributed to him by Wilson, but conceded speaking with employees, including Wilson, about the Union during the campaign. Federico was aware that Wilson supported the Union.

As set forth above, Respondent conceded that Wilson was engaged in union activities during the 1994 campaign.

2. An alleged threat concerning Danforth

Employee Art Thompson testified that during the 1994 campaign, Wilson told him that if he was discharged, he would shoot the person who fired him. He relayed this information to Danforth.

Danforth testified that in mid-November 1994, Thompson told her that he heard Wilson say that if he was discharged for his union activity, he would shoot whoever discharged him. She asked Wilson about it and he denied making the threat, and asked her to investigate the matter. She notified Plant Manager Bhalla, Corporate Official David Lopater, and Wilson's supervisor. Danforth spoke to the employees on Wilson's crew and later told Wilson that perhaps they were mistaken as to the date the comment was made. Wilson said they may have been confusing an earlier threat he had made to management.

Wilson's version is that he was told by Danforth that two employees told her that he had threatened to shoot her. Wilson asked for the names of the employees who reported the threat. Danforth refused to tell him, saying that such information was confidential. Wilson asked that charges be brought against him so that he could prove them to be false. Danforth answered that she would "let it go this time," warning that he should not let it happen again. Wilson denied making the threat.

Danforth stated that since she was not able to corroborate the threat, she would not take any action at that time, but that she would "reopen" the issue if a similar incident occurred thereafter.

3. Interaction with Kenneth St. Clair

Supervisor St. Clair reprimanded Wilson in April 1992 for apparently wasting time in waiting for a part to be fixed. According to St. Clair's written note made at the time, Wilson "became very loud and defensive and made comments that I had a personal vendetta against him." Following Wilson's explanation to another supervisor, St. Clair decided to drop the charge of insubordination.

St. Clair testified, but did not include in his contemporaneous memo, that during this altercation Wilson was angry, moved his arms around, and cursed.

4. An alleged threat to Michael Barstow

Michael Barstow testified that during the 1994 campaign he was a temporary employee who worked with Wilson. He told

his coworkers that if there was a strike he would cross the picket line. Wilson told him that there may be someone across the street with a weapon or rifle. Barstow asked him if that was a threat, and Wilson replied that he could take it anyway he wished.

Barstow believed that someone overheard that conversation, and a few weeks after the election he was called to Danforth's office. Danforth asked him about the conversation, and inquired as to whether he felt intimidated or threatened by anyone. Barstow did not volunteer any names, but Danforth mentioned Wilson and perhaps Bauerle's names.

Danforth asked if he felt threatened during the campaign and Barstow said he had, and recounted that conversation and an earlier one in which Wilson accused him of "squealing" on his coworkers, and offered to meet him outside to "settle the difference." At that time, Barstow accepted the challenge but Wilson did not appear at the designated place.

5. The O'Neill incident

The employees on each shift are responsible to make sure that their work areas are clean for the incoming shift. In January 1995, John O'Neill, who worked on a shift following Wilson's shift, complained to his supervisor, Paul McGuinness, that Wilson's "housekeeping" was poor, and that Wilson's work area was left with debris when O'Neill arrived for work. Such complaints were "continuous" according to Wilson.

Wilson was questioned by Supervisors Long and Dario Ciuffetelli concerning the complaints made by O'Neill. They decided that fellow employee Justin Connolly would inspect Wilson's area 5 minutes before O'Neill's shift began in order to ensure that the housekeeping was properly done. Connolly did so.

Apparently, McGuinness spoke to Wilson about O'Neill's complaint, since the following day, January 28, Wilson, according to O'Neill's testimony, approached him and asked why he (O'Neill) "ratted [him] out." O'Neill attempted to explain that he had not done so, but Wilson angrily interrupted by saying that O'Neill did not want him as his enemy, and that he (Wilson) was the worst person he would want as his enemy. Wilson also advised him that he knew about his past, and could easily obtain a police report which he could submit to Respondent which would lead to his discharge. Wilson also told O'Neill that he had seen his family in the area, and could identify them. Wilson left, telling O'Neill to have a nice evening.

Wilson's reference to O'Neill's past concerned an incident in which, while employed by Respondent, he was arrested for possession of cocaine. The charge was reduced to a misdemeanor and O'Neill served probation which ended in 1992. He did not report this incident to Respondent, but believed that he would be discharged because of Respondent's strict drug policy.

O'Neill resumed his work, but was frightened at the prospect of Wilson's revealing his arrest to Respondent, since O'Neill had threatened to do so 2 years before. O'Neill then left the production floor and approached management. He told Danforth he needed help and could not work under "these conditions." He told Danforth that Wilson threatened him with using certain information against him. He refused, at that time, to tell Danforth the nature of the information.

O'Neill wrote a statement, and returned to work. O'Neill testified that during his next break, he was told by coworker Marcy Chapman that he did not want Wilson as his enemy.

O'Neill then told Supervisor McGuinness what Chapman said. McGuinness called Danforth at home. She returned to the plant. O'Neill phoned his wife, and told her what had transpired. Shortly thereafter, O'Neill told Danforth that he had decided not to pursue the matter because he believed that if Wilson learned about the accusation it would "turn into a disaster" since he was already afraid of what Wilson might do. Danforth agreed not to pursue the matter.

6. Wilson confronts the supervisors

Danforth met with Chapman on about February 8, in connection with Chapman's meeting with her superintendent concerning her poor work and inability to get along with her coworkers. As an example of such conduct, Danforth mentioned her statement to O'Neill that he did not want Wilson as an enemy. Chapman denied saying that. At that point, no investigation was ongoing concerning Wilson's alleged threats to O'Neill.

Wilson testified that that day, he was told by Chapman that she was approached by Danforth who asked her questions about Wilson and O'Neill, attempting to have Chapman state that Wilson was harassing O'Neill.

That evening, while Wilson was working, he asked Supervisor Long if he could see Danforth. They walked to her office, and observed that she had left for the evening. Wilson then had a conversation with Long during which Wilson "begged" to be moved off the production line so that he would not have further problems with O'Neill. Wilson was admittedly upset, believing that an investigation was being conducted without his knowledge, based upon Chapman's statement to him. Wilson conceded that his demeanor during their talk was "excited," and that he spoke loudly, and that he made gestures with his hands in a begging motion while saying "move me, please move me."

Long said that he would call Danforth, and asked him to return to the production line, which he did. While working, Supervisor Ciuffetelli approached him, and Wilson asked to see Danforth. Ciuffetelli said that an appointment would be arranged for the next day. Wilson insisted upon speaking to her immediately. They went to an office where they discussed O'Neill's complaints about Wilson's housekeeping. Wilson asked him to check with Connolly who had been inspecting his work area. Wilson conceded that his manner during this conversation was the same as with Long—loud, and he used hand gestures. Ciuffetelli said that Wilson should return to work, and he would call Danforth and would let Wilson know when she arrived. Wilson went back to work.

Long did not testify. Danforth testified that she received a call from McGuinness and Long who said that while they were standing in the lobby, Wilson burst through the plant doors, "flaying" his arms and demanding to know who his accusers were and why he was under investigation, and insisting upon speaking with her. They told him to speak to her in the morning, and that it was not necessary for her to return to the plant that evening.

Danforth stated that about 45 minutes later, Ciuffetelli called her and said that he had been confronted by Wilson, who shouted at him, demanding to know who his accusers were. Danforth was asked to return to the plant and she did.

Danforth returned to the plant and met with Wilson.

According to Wilson, they spoke about O'Neill's complaints about his housekeeping. Danforth asked him whether he had a problem with his temper, adding that there had been a "pattern" of harassment and threatening behavior. Wilson protested that

he wished to speak only about housekeeping. Danforth replied that because of Wilson's pattern of threats, he should go to counseling. Wilson denied threatening anyone, and refused to go to counseling. Respondent has an employee assistance program (EAP) which is voluntary. Danforth said that she would continue the investigation.

According to Danforth, she told Wilson that she knew nothing of an investigation against him. Wilson told her that he believed that he was "under a microscope" on the production line, he was under great pressure, and he did not believe that he could continue to work under such conditions. He asked Danforth to help relieve the pressure, and she agreed to conduct an investigation into the matter in behalf of Wilson.

Danforth stated that on February 8, when she agreed to conduct an investigation, she was aware of what Wilson had said to O'Neill, but was not aware of Wilson's confrontation with the managers.¹

Danforth then spoke to supervisors, superintendents, and Bhalla. They told her that the problem concerning O'Neill and Wilson was caused by a lack of proper housekeeping on the production floor. They also advised Danforth that they were "quite concerned" about Wilson's behavior on February 8, during which he spoke to them in a loud tone of voice, was "shuffling back and forth," his arms were "flaying from the sides." McGuinness told Danforth that he was not sure what action Wilson would take at that time. Del Santo told Danforth that he was passing by the confrontation at the time and stayed in the area because he was not sure what would happen.

Bhalla recommended that Danforth notify the corporate office about Wilson's behavior because Bhalla believed that matters were "getting out of hand with this." She spoke with Corporate Official David Lopater who told her to meet with the supervisors, superintendents, and Wilson to "address the behavior specifically," and also told her to refer Wilson to the EAP program in order to address his behavior.

Danforth stated that, pursuant to that instruction, she held a meeting on February 14 with Ciuffetelli, Long, Mortensen, and Wilson. She testified that she told Wilson that O'Neill believed that Wilson had threatened him and his employment, and they also spoke about his behavior toward management on February 8. She asked him to attend EAP for his behavior and he refused. Danforth stated that when she mentioned EAP, Wilson rose from his chair, and began to move his torso and his arms back and forth. Wilson then told her that he believed that Danforth was making the referral "because of what happened at the Post Office." Danforth believed that Wilson was referring to the shootings of certain Postal Service managers by a coworker.

Danforth testified that she regarded the "Post Office" comment as "severe," and the next day spoke to corporate vice president of human resources Bob Greene and Lopater. She told them of the meeting the night before. They said that they were concerned for her safety and the safety of others, and contacted Anheuser-Busch security. That office called her and told her to call the local police department to report the "Post

Office" comment, and also said that they had retained a private investigating firm which would interview her. That firm searched four counties for a criminal record of Wilson but found none. The local police department offered 24-hour security for Danforth, which she declined.

Danforth then asked McGuinness, Long, Ciuffetelli, James DelSanto, and Wilson to prepare statements, which will be discussed below.

During the next several days, Danforth called Wilson several times asking that he attend EAP sessions because of his "pattern of harassing and threatening people." Wilson refused to attend based upon his attorney's advice that by doing so he would be admitting that he engaged in improper conduct and needed such help.

Wilson was then asked to speak to Danforth on February 17. Danforth told him that she was doing an investigation into the events of February 8, when he met with Long. Wilson asked what the charges were, and Danforth replied that there were no charges, but that Long was "frightened" in their meeting. She also told him that O'Neill had complained that Wilson was harassing him, and that he had a pattern of harassing and threatening people. Wilson asked to speak to his attorney before writing the statement, but Danforth refused this request, and said that if he left he would be terminated for insubordination. According to Danforth, Wilson demanded to know why he was under investigation, adding that it was not like there was a "dead body" here with someone standing over it with a smoking gun and witnesses at the scene.

In his statement, Wilson said that he was upset at being told, by an employee and not the human resources department, that he was being investigated. He conceded that he may have been upset, but denied threatening or being insubordinate to Long or other management personnel.

On February 18, Wilson spoke separately with Long and Ciuffetelli, and secretly recorded the conversations. According to transcripts of the recordings, Long told him "off the record" that "they don't have enough evidence to get you on . . . O'Neill . . . and now they're looking for something else. That's my opinion." Long denied that Wilson threatened him, adding the "the only thing I saw is that you was upset with the situation. . . . Like anyone else, you was allowed to work off little steam. Now, if you don't get it out of your system, you'll never get it out. That's what we're here for to help you get it out of your system." Long added that he might act in the same way if there was an investigation about him which he was not told about. Long also noted that Danforth is "making it seem like you're out of control." He also stated that he did not view Wilson's behavior as being threatening, disrespectful or insubordinate. Rather, he believed that Wilson was "upset with the situation" and "letting off a little steam." Long also observed that he has seen people talk louder. Long warned Wilson that he was "underneath the microscope" and that he should "just keep yourself clean."²

¹ Danforth was in error in stating that on February 8 when she returned to the plant after work, she did not know of Chapman's statement to O'Neill. O'Neill's written statement which he gave Danforth and in which he mentioned the Chapman comment was dated January 28. Furthermore, Danforth testified that she questioned Chapman about the remark on February 8, which must have been during the regular workday, prior to her return to the plant that evening.

² I reject Respondent's argument that Long was biased against Respondent. On March 5, 1995, Long received a written warning from Bhalla for causing an injury to an employee while operating a machine, and Long resigned on April 3. There is no evidence that Long was not acting in the interest of Respondent when he spoke with Wilson, as alleged by Respondent. His recorded testimony is generally consistent with the written statement he gave Danforth. Moreover, his recorded conversation and written statement to Danforth are consistent with Ciuffetelli's.

Long further told Wilson that it was his opinion that concerning allegations made by others, "either nobody is stepping forward or she don't have the evidence. So now she's looking for something else. . . . If I thought you was being disrespectful . . . you would have known right then. I didn't take it as that. I didn't interpret it as that. I interpreted it as a situation that has been handled and it wasn't handled properly and they didn't come to you and they didn't notify you and you weren't." Wilson suggested to Long that Respondent was saying that Long and Ciuffetelli were "offended" Long replied, "[F]uck no, I never, never said that."

Long's written statement obtained by Danforth stated that during his conversation with Wilson, he was "talking very loud and it was apparent that he was upset over the situation and out of control. I told Steve to calm down." They spoke about Danforth's availability, and then Wilson apologized for "being out of control and talking loud but that he was upset over the situation."

In his recorded conversation with Ciuffetelli, Wilson mentioned that Danforth accused him of threatening and being insubordinate to him and Long. When asked by Wilson if he was threatening to him in any way, Ciuffetelli replied, "I told her you weren't. I said you were venting. . . . Had I said calm down and you didn't calm down, then it would have been insubordinate. I told her that I said absolutely nothing the whole time. . . . I told her I said you were upset, you were very loud. . . . and the whole thing was over the fact that you felt they're doing an investigation on you and you wanted to know what was going on." Ciuffetelli added that Wilson was yelling, was "pissed and you told me so, and that was the end of that." When asked by Wilson if he was disrespectful or insubordinate, Ciuffetelli replied, "I didn't say anything."

Ciuffetelli's written statement obtained by Danforth stated that Wilson asked him why he was being investigated, and what he had done wrong. He claimed that O'Neill and McGuinness were "out to get" him. Ciuffetelli added that Wilson "interrogated" him for 5 minutes while "flailing his arms and pacing back and forth, inquiring 'so what do you have to say about all this?'" Ciuffetelli denied any knowledge of the matter and Wilson said, "I can see they've trained you well." In another statement, Ciuffetelli stated that Wilson spoke to him and Long in an "agitated manner."

In his testimony, Ciuffetelli stated that Wilson was very upset and extremely agitated when they spoke, demanding to know why he was being investigated. His arms were "flailing and moving about."

In a statement obtained by Danforth, Supervisor DelSanto stated that during the conversation, which he observed, Wilson's arms were "flying all over the place and somewhat pacing back and forth. He seemed very excited and his voice was quite loud." Supervisor McGuinness' statement, also obtained by Danforth, stated that Wilson was "in a highly agitated state" when he asked to see Danforth. Wilson shouted at Long, while flailing his arms and shifting his feet. Wilson asked whether O'Neill was running the crew, stated that he had a right to face his accuser, and that Long, Danforth, and McGuinness were out to get him. McGuinness stated that after a while he was not listening to Wilson, but rather was "primarily focused on Steve's body language and actions. I was quite unsure of what he was capable of, but recognizing [sic] it of having the potential of escalating out of control." Wilson then "abruptly terminated the conversation, spun around and" returned to work.

McGuinness testified that Wilson was "pretty agitated" when he approached the supervisors and asked whether O'Neill was "running the crew." Wilson then told them that he had a right to know "what was going on?" McGuinness replied that he did not know, and Wilson asked to speak to Danforth. McGuinness said that Wilson stuck his hands out and said he was so upset that his hands were shaking. McGuinness stated that he considered as "very dangerous" Wilson's gesturing and shaking his hands, his feet movement and shifting from side to side, notwithstanding that Wilson did not hit him or make a fist.

O'Neill further testified that on February 19, Wilson asked O'Neill if he had made a threat.³ O'Neill replied that Wilson had threatened him by saying that he would reveal O'Neill's past. Wilson then told O'Neill that "they" were trying to "get" him and that O'Neill should "call the dogs off." Wilson asked him if he had made a threat why did he not carry it out. O'Neill said that he did not know. Wilson became angry, and told him not to take it as a threat but that if something happened to him (Wilson) did not know what he would do.

O'Neill interpreted this as a threat and reported it to Danforth. He still did not want to pursue the matter, and Danforth told him that she would retain his statements in the event that something happened in the future. Danforth offered him "security" which he did not accept. Danforth testified that although O'Neill did not want to pursue Wilson's threats, and she did not "go forward with the investigation" pursuant to his request, she told him that she had an obligation to report it to the "appropriate people," apparently corporate officials.

7. Wilson is discharged

Wilson continued to work, apparently without incident for 5 weeks, when on March 14, he was met by Long. In a conversation recorded by Wilson, he told Wilson "they think they got enough to fire you . . . [for] everything that Brenda has talked to you about. I think it's conduct unbecoming a team member." When Wilson protested that Long had previously told him that he was "okay," Long replied, "I thought so," and that this was the first he had "heard of it today," and that if he had known before then he would have spoken to Wilson.

Long told Wilson that he was not being fired for harassment, and that the conversation they had on February 8 was being "blown out of proportion."

Wilson then went into a meeting with Danforth at which he was given a termination letter. The letter stated that he was discharged for violation of the following handbook policy:

Never cause a disturbance by running, yelling, harassing, playing practical jokes, fighting, engaging in horseplay or other acts of a similar nature, including use of disrespectful, profane or threatening language.

Do not engage in disruptive behavior of any kind which interferes with your work or the work of another Team Member.

The letter further stated:

On Wednesday, February 8, 1995, you had several periods of interaction with salaried staff of the Newburgh facility. Your tone of voice and body language was inappropriate and was conceived as threatening by the staff. This has occurred on

³ O'Neill was in error in testifying that it occurred on February 24. His written statement to Danforth states that it took place on February 19.

several occasions when management has delivered feed back to you that you may not be in agreement with. Actions such as these will not be tolerated and are considered conduct unbecoming a Team Member. This inappropriate conduct is a clear indication that you are either unwilling or unable to meet the expectations of a Newburgh Team Member.

Danforth stated that prior to Wilson's discharge, she heard from certain named employees and Supervisor Ciuffetelli that Wilson had bragged about instances where he was involved with confrontations, including physical confrontations with people off company premises.

Danforth testified that the decision to terminate Wilson was made between the corporate office and Plant Manager Bhalla. No discussion concerning Wilson's union activities took place during the discussions concerning the decision to fire him.

Danforth stated that Wilson was discharged "specifically" for his behavior to management and for the threats that were communicated to management. She also stated that Wilson's comment to Thompson, that he would shoot whoever fired him for his union activities, may have played a part in the decision to fire him.

Danforth conceded that she had never seen Wilson harm or injure anyone, and no one had alleged that he had been struck by him.

Danforth stated that the threats to O'Neill played "very little, if any" role in the decision to terminate Wilson. As set forth above, the discharge letter did not mention the O'Neill or any other incidents other than the February 8 confrontation. Danforth noted that the decision makers were aware of Wilson's interaction with O'Neill but they did not want to involve employees in disciplinary actions against their coworkers. However, Danforth later testified that Wilson's interchange with O'Neill played a part in the decision to terminate him. In fact, Danforth stated that she drafted a discharge letter which contained references to the Thompson comment, the O'Neill incident, and Wilson's remarks concerning the Post Office and "smoking gun." That letter was rejected by the corporate officials to whom it was sent, and instead a letter, set forth above, was written by them, discharging Wilson. The draft letter was not produced at hearing.

Plant Manager Bhalla testified that he made the decision to terminate Wilson based upon the threats to O'Neill and his actions during his conversations with management on February 8, which Bhalla concluded was conduct unbecoming a team member.

Bhalla testified that he was present when O'Neill first approached management, claiming that he had been threatened by Wilson. Bhalla then heard that there were additional threats which made the matter "much more serious."

Employee Justin Connolly testified that following the election, Long told him that he was angry that Respondent was making the supervisors do things that he did not want to do. Following Wilson's discharge, Long told Connolly that he was "sorry for what he did to" Wilson.

Conclusions Regarding Wilson

The General Counsel has the initial burden of showing that Wilson's union activities were a motivating factor in the decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980). As set forth above, Respondent stipulated that it was aware of the union activities of Wilson during the 1994 campaign which concluded with the Union's election loss in October.

Respondent established that other employees also wore Union clothing, and also engaged in the same types of activities as Wilson, Bauerle, and Murray. Furthermore, others who acted as observers in behalf of the Union remained employed by it. Of course, the fact that more union supporters were not discharged is not evidence of lawful treatment of Wilson.

Respondent bore animus toward the Union as established by the credited testimony of employees Bell and Connolly that Respondent's official Stafford told the workers that he would shut the facility if it became unionized.⁴ In addition, Federico told him that he did not know if Respondent would retaliate but he should not ask for any favors. I credit Connolly's version of his "FTU" conversation with Bhalla. It is clear that the button was directed toward the Union as it was worn in response to the union supporters' wearing of their union buttons. It is logical to assume that Connolly, who did not support the Union, would have had the confidence of Bhalla, and it is further likely that Bhalla would have made a statement to him relating to discharging union supporters.

I accordingly find that the General Counsel has established that Wilson's union activities were a motivating factor in the decision to discharge him.

Once the General Counsel has made this showing, the burden shifts to Respondent to prove that it would have discharged Wilson even in the absence of his union activities. *Wright Line*, supra.

The letter discharging Wilson specifically referred to his conduct on February 8 toward supervisors, in which he used an "inappropriate" tone of voice and body language which was viewed as threatening. It was concluded that this conduct was "unbecoming a Team Member" and was deemed sufficient for discharge.

The letter also referred to other alleged instances of similar conduct toward supervisors, none of which has been documented in this record, with the possible exception of the St. Clair incident. That event, which occurred more than 2 years before Wilson's discharge, involved one contemporaneously documented instance where Wilson was loud and defensive toward St. Clair. I cannot credit St. Clair's testimony that during this altercation Wilson was angry, moved his arms around, and cursed. That description was not included in St. Clair's memo written at the time, and if that had been the case, it is doubtful that St. Clair would have dropped the charge of insubordination against him.

Nevertheless, the St. Clair incident occurred more than 2 years before the discharge, and no disciplinary action was taken against Wilson.

Danforth's testimony that the reasons for discharging Wilson may have included his conduct toward O'Neill is equivocal inasmuch as she also testified that the O'Neill incident played very little, if any role in the decision to discharge him. Similarly, Bhalla's testimony that the O'Neill incident contributed toward his recommendation of termination would surely have come to Danforth's attention since she was involved in the termination decision. Moreover, those additional reasons were not included in the official letter of discharge. Danforth's testimony that she wrote a complete letter containing Wilson's history of improper conduct to corporate officials is not supported since no evidence of the letter was produced at hearing.

⁴ Stafford did not testify.

Accordingly, we are left with the termination letter itself as the official, stated reason for the discharge—that during Wilson's discussion with the supervisors on February 8, his "voice and body language was inappropriate and was conceived as threatening by the staff." However, with respect to the February 8 incident, even the statements given by the supervisors to Danforth do not support Respondent's stated basis for firing him. Thus, the supervisors' written statements only asserted that Wilson was upset upon hearing from Chapman that questions were being asked about him, and believing that an investigation concerning him was taking place, he loudly asked the supervisors in an excited, agitated manner, while moving his arms and pacing, what was occurring. Long's statement said that Wilson apologized for being loud.

It is important to note that following this confrontation, Wilson returned to work without any discipline being imposed, and continued to work for 1 month before being terminated. Further, the secretly recorded conversations establish that the supervisors allegedly threatened did not feel threatened. Indeed, Long told Wilson that he was permitted to let off steam as other people were, and that the supervisors' job included "helping" workers "get it out of [their] system." Long also accused Danforth of making it appear as if Wilson was out of control, and denied that his conduct was threatening, disrespectful, or insubordinate. Similarly, Ciuffetelli stated that Wilson was not threatening, and was not insubordinate.

I cannot credit Respondent's contention that the O'Neill incident played a part in the decision to discharge Wilson. First, Danforth said that that matter had little, if any effect upon Wilson's discharge. Wilson was not disciplined in any respect for the incident. Moreover, no actual physical threat to O'Neill was involved. There was only a threat to reveal truthful information about O'Neill's past which he had concealed from Respondent.

Similarly, no action was taken concerning Wilson's alleged threat made to Thompson. Following Danforth's investigation, she concluded that the alleged threat could not be corroborated, and dropped the matter.

Further, the reaction to Wilson's comments about the post office and smoking gun seem to be exaggerated. In relation to the O'Neill incident, Wilson was simply remarking that he believed that the referral to EAP was being made because of the post office situation, and that his conduct could not be compared to an actual killing. Wilson did not threaten anyone in making these comments. He was simply remarking upon Respondent's overblown reaction to the O'Neill incident, for which no discipline was imposed upon him. Moreover, he was permitted to return to work following those comments and worked for more than 1 month before his discharge. His refusal to attend the EAP sessions was not improper since such attendance is voluntary unless it is required as part of a warning. Here, Wilson was not required to attend EAP for his actions on February 8, and no reference to his failure to do so was made in the letter of discharge.

I thus find that Respondent's additional, shifting reasons for discharging Wilson lacked merit, in that they were purposely added as reasons following his discharge, as variously testified by Danforth and Bhalla, and that such additional alleged reasons played no role in the decision to discharge him inasmuch as no discipline had been administered. *Scientific Ecology Group*, 317 NLRB 1259 (1995).

I accordingly find that Wilson had not engaged in threatening conduct toward the supervisors on February 8 as set forth in

the termination letter. If Respondent in fact believed that Wilson was a threat to supervisory personnel, it would not have permitted him to return to work immediately after the confrontation, and would not have permitted him to work for 5 weeks thereafter. As set forth in the following section concerning Bauerle, employees who were engaged in more serious behavior were not discharged.

I therefore conclude that Respondent has not met its burden of proving that it would have discharged Wilson even in the absence of his union activities. *Wright Line*, supra.

D. Kurt Bauerle

Bauerle was employed for nearly 7 years as a production technician. His 1994 performance evaluation stated that his work, in various areas, ranged from standard to good.

As set forth above, he was active in the 1994 union campaign by being the head of an organizing committee. He attended the early union meetings, signed a card for the Union, and solicited employees to sign cards both in and outside the plant. He also distributed union literature inside the plant before work began. Bauerle stated that his supervisors, Al Varrone and Warren Tomlins, saw this activity but did not comment on it. Instead they shook their heads and rolled their eyes.

Bauerle stated that he initiated a conversation with Tomlins about the Union during the 1994 campaign. Tomlins asked him, "[W]hat's going on? What's wrong with you people?" Bauerle gave his reasons for wanting the Union, and Tomlins showed him a collective-bargaining agreement and said that Bauerle should not want a card since he would have to follow many rules. Bauerle responded that the employees wanted rules since the Respondent would be obligated to follow them also. Tomlins concluded by saying that he could not change Bauerle's mind, but that he should "watch [his] back."

Bauerle also testified that 2 or 3 days before the election, Plant Manager Bhalla escorted him outside during worktime and asked what he could do to have Bauerle vote against the Union. Bauerle said that he could do nothing, since he was one of the organizers, has been wearing union clothing, and would vote yes. Bhalla asked him to give him a chance to correct all the problems with the plant. Bauerle responded that he would vote as he saw fit.

The "plant line monitoring" system (PLM) is a computerized communication device used by machine operators to speak to each other by typing messages which appear on a screen. It is useful because the distances between machines are great and because of the noise generated by the machines, oral conversations are impractical.

The PLM machine is supposed to be used to advise operators and technicians of production problems with the machine, for example that it had a jam and needs to be cleared. The message may be sent plantwide or to an individual. The message identifies the work station from which it was sent, but not the person who sent it. However, the PLM system has also been used to send nonwork related, offensive messages. According to Bauerle, the PLM system has been abused on a daily basis, with supervisors and Tomlins also misusing it. In an effort to end this practice, Plant Manager Bhalla told all the workers that they should not use the PLM for wisecracks.

During the election campaign, an employee typed a message asking why management was telling him to vote "no" in the election. Bauerle wrote a message which was sent to the entire plant, advising that it was illegal for management to coerce

employees in that way. A message was then sent on the PLM with Superintendent Tomlins' screen name, which said that management would "back off."

1. The threat to Warren Crosby

On March 13, 1995, Bauerle noticed that many of the cans which were approaching his can washing machine were tipped over, causing much lost production and jamming. He observed that the tip overs were coming from a certain area—line three and four body makers, and wrote a message on the PLM asking employees in those areas to correct the problem. He also told them something to the effect that the loss of production was affecting his bonus, and asked them to "try and care about your job for a change."

In response to that message, Bauerle received a message stating that more tipped over cans were coming, and he should fix it himself. Bauerle then walked past the line three and four body makers and saw Warren Crosby using the PLM. Because of the noise level in the plant, and their use of ear plugs, Bauerle and other employees use a sign language system to communicate. He was 30 to 40 feet from Crosby, got his attention and pointed to him, indicating that it was him who was using the PLM. Crosby gestured "so what." Bauerle said that he would "see [you] after work then," and returned to his work station.

Crosby then wrote on the PLM "why after work, so you can kiss me?" At that point, Superintendent Tomlins passed by and Bauerle told him that Crosby is "trying to wind me up here and he won't stop." He asked Tomlins to tell him to cease the nasty messages. Tomlins told Bauerle that if he did not stop he would be in serious trouble. Tomlins told Bauerle that he would tell Crosby to stop also. Bauerle stopped writing messages, but Crosby wrote, "[B]itch, bitch, bitch. All you . . . do is bitch. You make all this money and you gotta bitch."

Bauerle testified that he left his work station and pursuant to his job responsibilities, began picking up the cans that were on the floor. At that point, there were no more tip overs. He approached Crosby, who was grinning. Bauerle gestured "keep smiling" (by putting his fingers at the sides of his mouth and forming a grin), "because Tony Bhalla will fire us both" (pointing his index finger at his forehead meaning Bhalla as a symbol of Bhalla's Indian nationality, and making a kicking motion with his foot).⁵ Crosby then left his work station and walked past Bauerle.

Twenty minutes later, Tomlins summoned Bauerle to meet with Danforth. At the meeting, Danforth asked him what happened, and Bauerle said that he and Crosby were arguing on the PLM. She asked what did the gesture of pointing to his forehead meant, and Bauerle explained that it was a reference to Bhalla.

Danforth then said that Crosby interpreted the pointed finger as a pistol, and believed that Bauerle was threatening to shoot him. Bauerle conceded that he might have told Danforth that his temper gets the best of him, and that the "wise guys" don't stop.

In the statement he prepared for Danforth at that time, Bauerle stated that he had been attending counseling sessions in order to control his temper, and has made great progress. He also stated that some workers enjoy taunting and instigating

him, knowing that he has difficulty dealing with personal attacks. He conceded that his reaction to those attacks was improper. Bauerle also noted that he was being "pushed and instigated" and that Crosby exaggerated what Bauerle had done in order to minimize his own responsibility for the incident. Bauerle concluded by stating that he would do "whatever it takes to make amends and keep [his] job."

Danforth told him that she had called the police, and he would be suspended pending an investigation. The police did not come to the premises.

A letter dated March 17 was sent to Bauerle, discharging him. It stated, in relevant part, as follows:

On March 13, 1995 you were involved in an incident with Warren Crosby. The incident started with the exchange of comments on the PLM messaging system and eventually became derogatory in nature. The messaging escalated to the point of involving Superintendent Warren Tomlins. Warren counseled all parties involved and stated that he would not tolerate any further discussion or interaction on the matter. The counseling was violated by the situation escalating to one-to-one confrontations with Warren Crosby.

In the direct conversations with Warren Crosby you admittedly made statements that were interpreted as threatening. Statements such as these are violations of the Team Member handbook, the Disciplinary Policy, and Anheuser-Busch's policy on Violence in the Workplace. During the D Crew roundtable meetings, Tony Bhalla has specifically stated that PLM messages that could be construed as sexual harassment, racial, or derogatory in nature would no longer be tolerated in this facility. Your PLM activity of March 13, 1995, is a clear violation of the stated expectations. The intended use of the PLM has been communicated to all Team Members at various times over the past several months.

In a memo dated March 17 giving Crosby a 3-day suspension for misuse of the PLM, Tomlins stated that Bauerle made "implied threats to your personal well-being."

As to the March 13 incident, Tomlins testified that when called over by Bauerle, he read the messages sent by Bauerle, which included that "Warren Crosby is a pussy." Tomlins told Bauerle that his actions were not "helping matters much." Tomlins told Bauerle and Crosby to stop sending messages. Tomlins stated that no disciplinary action was taken regarding the plm comments sent by Bauerle, and none would have been forthcoming if the incident had ended at that time.

Tomlins further stated that a short time later he was told by Crosby that Bauerle had come over to him and said that he would see him at the end of the shift and would "kick his ass." Tomlins then asked Bauerle what he was doing, adding that he already spoke to Crosby. He asked Bauerle what he said, and Bauerle said that he told Crosby that he would see him at 6 p.m. Tomlins told him to drop the matter, but Bauerle, angered, said, "[S]omeone is going to get their ass kicked." Tomlins told him that if there was a fight, both participants would be fired. Tomlins stated that if the matter ended then, no disciplinary action would have been taken.

Shortly thereafter, Crosby came into the superintendent's office and announced that he was leaving because "I am not going to be threatened." Crosby told him that Bauerle approached him and said that if he was going to lose his job, he would do

⁵ In his statement prepared that evening, Bauerle wrote that he mouthed the words "hope you're happy, cause now I'm gonna get fired."

10 to 15 years for shooting the one who caused him to lose it, and then pointed to his own forehead. Crosby asked him what he meant by that, and Bauerle said that that is where he would put the bullet—between Crosby's eyes.

Tomlins asked Crosby to repeat the story and he did, asking him if he understood the seriousness of his accusations. Crosby said he did. Tomlins called Danforth at home and asked her to return to the plant because a threat had been made against an employee. Crosby repeated the story again, and met with Danforth who asked him to write a statement. Danforth testified that when she arrived at the plant, Tomlins told her what happened and recommended that Bauerle be discharged.

In his statement, Crosby declared that following the initial PLM messages, he received a message that said, "Crosby, you're a pussy." Tomlins told him and Bauerle to stop. Then Bauerle approached and asked if he had been using the PLM. Crosby said he had, and Bauerle said he would meet him at 6 p.m. outside, and would "kick your ass." Crosby complained about this threat, and Tomlins said he would take care of it. Shortly thereafter, Bauerle approached and told Crosby that he hoped that he was happy since Crosby caused him to be fired. Crosby said, "[W]hatever" and Bauerle asked if he thought this was funny. Bauerle then said that he (Bauerle) was fired and Crosby was "getting this," pointing to his forehead. Crosby said, "[W]hat," and Bauerle said, "[A] bullet right between the eyes." Crosby then left his work station and reported the threat.

Tomlins stated that he then called Bauerle to the office. Tomlins took notes during the meeting.⁶ According to the notes, Danforth asked Bauerle whether he said that he was so upset that he could have killed someone. Bauerle answered that that was true, adding that his temper gets the best of him. Bauerle denied saying that he would put a bullet in Crosby's head, and denied threatening anyone. Bauerle told Danforth that when he pointed to his forehead he meant that Bhalla would fire him, adding that pointing to his forehead indicates Bhalla.

Tomlins testified that Danforth asked Bauerle whether he threatened someone, and did he threaten to kill someone, and Bauerle answered that he was upset. Danforth asked whether he could have done it, and Bauerle said he could have. Bauerle added that he gets upset if people antagonize him. He was apologetic about the incident and said it would never happen again. He also denied saying that he would shoot Crosby.

Tomlins said he credited Crosby's version, and did not believe Bauerle because Crosby's version was consistent when repeated, and Bauerle's version of the story changed when questioned by Danforth. No explanation of how Bauerle's story changed was given. Tomlins denied knowledge of the use of hand signs to identify members of management. It should be noted that employee Murray testified that employees communicate by using sign language and gestures identifying people in the plant. Employee Connolly testified that employees communicate by yelling, speaking in each other's ear, or using hand gestures.

⁶ I reject the General Counsel's assertion that the typewritten version of the notes were not accurate. Tomlins stated that he took written notes at the time of the meeting, and the typewritten document presented at hearing accurately set forth the conversation as set forth in his original notes. The fact that the handwritten notes were destroyed, or that Danforth signed and dated the typewritten version does not detract from the veracity of this evidence.

Tomlins concluded that Bauerle's failure to follow his direct request to cease the conduct relating to that incident was insubordinate, and that threatening an employee was an offense punishable by termination. He recommended that Bauerle be suspended pending the completion of the investigation, and then terminated for threatening an employee's life and insubordination. Tomlins recommended that Crosby be suspended for 3 to 5 days for misuse of the PLM system and possibly instigating the event. Crosby was suspended for 3 days.

Tomlins stated that Bauerle's union activity played no role in his decision to recommend his termination. Tomlins acknowledged that when he was a nonsupervisory employee he was aware of rough language and threats to harm employees being made in the plant.

Danforth testified that Bauerle told her that his gestures toward his forehead signified Bhalla, and denied stating that he would shoot Crosby. Bauerle said he was angry, and could have hurt Crosby. Danforth asked whether he was angry enough to have killed Crosby and Bauerle said that he was. Bauerle apologized for his conduct.

Danforth called Corporate Official Lopater and Bhalla. She was told to send Bauerle home pending investigation. Lopater said that he would contact the Anheuser-Busch legal department, and Tomlins' recommendation was solicited. Tomlins recommended discharge notwithstanding Crosby telling Tomlins that he did not want Bauerle fired for this incident. Thereafter, Bauerle was discharged.

The General Counsel makes much of the fact that Tomlins made a recommendation to discharge Bauerle without any interview having been conducted with Bauerle. However, Tomlins had been involved with the incident from the beginning, and found it necessary to warn Bauerle twice to cease his inappropriate conduct, including a final warning, even according to Bauerle that if he did not cease, he would be in "serious trouble." In addition, after the first warning, Bauerle persisted, asking Crosby to meet him after work. In any event, Tomlins did not make the final decision to discharge Bauerle.

There was evidence that Bauerle had a problem with his temper. Thus, in 1992, he had an "altercation" with another employee and was required to attend counseling for 1 day, which the Company paid for. Bauerle attended another 2 days and personally paid for those extra sessions. In about November 1992, he dumped a large number of cans on the floor in protest of an employee's refusal to shut a machine which was producing defective cans. Bauerle's evaluations in 1992, 1993, and 1994 all made reference to his temper, controlling his emotions, and "outbursts." Nevertheless, according to Bauerle, his anger or temper never caused a loss of production, and he never damaged company equipment or products, and never struck anyone—inside or outside the plant.

Tomlins recounted a prior incident where he had to position himself between Bauerle and Crosby who appeared ready to fight. Tomlins told them to break it up and return to work. They both apologized.

2. The alleged disparate treatment toward Bauerle

The General Counsel argues that Bauerle was treated in a disparate manner, in that others who have engaged in similar, if not more serious conduct, had not been discharged. They will be discussed here.

Employee Connolly testified that in April 1995, Company President Jim Engelhuber toured the plant and asked him about

an apparent mistake in an image on the cans he was making. Connolly misrepresented the cause of the problem to Engelhuber, who apparently believed that Connolly told him that the problem would not be fixed for one week. Plant Manager Bhalla then approached him in a "physically threatening way," yelling, screaming in his face, waving his hands, and demanding to know whether he told Engelhuber that the machine would not be shut for repairs until the following week.

In 1997, Connolly had received permission to remove a quantity of lumber from the plant. He used it on a construction project at home. Coworker Stefan Chunga accused Connolly of stealing Chunga's wood. Chunga asked him to discuss it in the plant boiler room and Connolly refused. They spoke with Danforth present, and it was learned that Chunga had videotaped Connolly's home. Connolly asked that action be taken against Chunga for filming Connolly's home. Chunga was directed to apologize to all four crews, and give Connolly the videotape.

Connolly testified that he confronted coworker Rodney Koontz about comments Koontz was making on the PLM about Connolly's girl friend. Connolly told Koontz to meet him after work. This confrontation continued for 1-1/2 weeks. Finally, Supervisor Al Varrone told them both to stop it or they would be in big trouble.

In February 1995, an altercation occurred between employees Brian Owens and Ed Martin. Owens accused Martin of making derogatory comments about him on the PLM, and Martin denied it. When Owens persisted, Martin assaulted him, picking him up and throwing him against a wall. Martin, a probationary employee, was discharged, and Owens received a 5-day suspension.

The suspension notice stated that Owens was involved in "altercations" with employees throughout the day, and that they were prompted by racial statements which provoked Owens into confronting employees. Following an incident in the breakroom, his superintendent instructed him to return to his work area and "drop the issue." Instead, Owens continued to question employees for the rest of the day, with some questioning considered as a "form of non-verbal assault" in which Owens "thrust" himself in an employee's face while questioning him, and not allowing him to pass by freely. In addition to the suspension, Owens was required to report for EAP counseling, and was warned that further incidents of this type "will result in immediate termination." He was further warned that a further failure to remain in his work area when instructed may be considered as insubordination.

In the memo firing Martin, it was noted that the following "led to" his termination: excessive absenteeism; a verbal warning on January 9 for making demeaning remarks about employees, and sexually harassing messages on the PLM; and his assault of Owens.

Wilson testified that, as part of the altercation, Owens lunged at him but did not touch him. Owens was prevented by Long from reaching Wilson.

The General Counsel also cites an incident in December 1994 in which James Chapman complained to management that on 4 days, Brian Owens made false statements about Chapman on the PLM and also verbally harassed him and physically "postured" in his presence, attempting to cause a confrontation. Chapman called Owens a "low-life piece of shit, a rat, a weasel and a pussy."

Superintendent Long spoke to Owens. Owens wrote a statement in which he stated that he was told by Chapman that Leon

Long was being transferred to C crew, and that he (Owens) should go also, since Sam would be taking over their crew, and that Sam would "take care" of Owens "and the rest of the homies." Owens interpreted that reference to mean that Sam would make work difficult for African-Americans such as Owens. Owens published Chapman's comments on the PLM, and the next day Chapman called him various names.

Following their discussion, Long told Owens to conduct business only with Chapman until the matter was resolved, and not to use the PLM in such a manner.

In March 1995, a written warning was issued to Russell Falkena by Tomlins for "interacting inappropriately" with coworkers regarding crew issues. It was noted that his behavior and attitude was regarded as "intimidating and unbecoming a team member." The warning concluded that although he provided a basis for his actions in some cases, nevertheless his behavior could not be condoned. In addition to the warning, Falkena was referred to EAP. He was warned that "any further report of this behavior or other unacceptable performance will lead to further discipline up to and including discharge."

On March 21, 1995, Marcy Chapman was issued a "90 Day Review of Expectations" in which her history of performance issues were reviewed.

The review noted that in December 1993 Chapman received a notice that she needed improvement in the following areas: excessive time taken on breaks, lunch, and at other times, and greater respect and professionalism needed to be shown to coworkers. In 1994, Chapman was cited for excessive time away from her work station, horseplay, and failure to show respect and professionalism to fellow employees.

Chapman's February 13, 1995 comment that she would have "James take care of the electricians" was in response to electricians criticizing her failure to correct a problem, and violated the corporate violence policy. It was also mentioned that she was in conflict with the employees she interacted with daily. She was warned that the situation must improve immediately. It was further noted that she created unfounded situations between employees and management which caused "damage" to her coworkers. Chapman received a 1-day suspension on February 18 for poor work performance.

On November 30, 1995, a written warning and EAP referral was given to employee Bob Uszenski for engaging in a disagreement with a coworker, which culminated in Uszenski's statement that "you better stay clear of me or your wife and baby won't have a father." Supervisor Federico noted in the warning that the statement was in violation of the Company's rule concerning workplace violence. He was warned that any "similar behavior in the future will not be tolerated and will result in further discipline, up to and including termination." Federico, who testified, was not asked about that warning.

On December 2, 1995, Tomlins issued verbal warnings to Roy Langer and Patty Rivera for engaging in a confrontation in which Rivera made inappropriate comments, which Langer interpreted as "threatening in nature." The comment was, "Why did you turn me in to Bill Bessette? You are fucking with the wrong person!" In addition, the records show that Rivera was given a 1-day suspension (Decision Making Day), with a warning that "any future misconduct of this nature will not be tolerated and will result in immediate termination." Rivera had received three prior verbal warnings for taking extended breaks.

In sum, I do not believe that the above are evidence that Bauerle has been subject to disparate treatment. Bhalla was

justifiably upset at the company president's apparently being told by Connolly that a problem with a machine would not be fixed for 1 week. No threats were made to Connolly. Chunga's request to Connolly that they meet in the boiler room was not an overt threat, and Chunga's videotaping of Connolly's home, apparently in an effort to document that he had Chunga's wood, was not improper. Connolly's invitation to Koontz to meet him after work, while the same type of threat as made by Bauerle, apparently ended when Supervisor Varrone told them to stop the continuous PLM messages or they would be in big trouble. In contrast, Bauerle continued his confrontation with Crosby even after being twice told to stop by Tomlins. Owens' case comes close to Bauerle, but does not equal the seriousness of Bauerle's conduct. Owens' conduct was similar in that he continued his confrontation with employees after being taunted by other employees, even after being told to cease. He thus was provoked as was Bauerle. However, the difference in the cases is that Owens committed only a "non-verbal assault" upon an employee by approaching very close to another employee. In contrast, Bauerle invited Crosby to meet him outside and threatened to assault him, and later his gestures were interpreted by Crosby as a threat to kill him.

The December 1994 incident involving Owens in which Long simply advised him not to become personally involved with Chapman, resulted from a mutual confrontation between him and Chapman, in which Chapman allegedly made a racially derogatory comment. Although Owens allegedly verbally harassed and physically postured toward Chapman, no threats were made.

Falkena allegedly intimidated other employees, but no details were given and there is no evidence that threats were made. Uszenski's statement to an employee that he should avoid being near him or his family would be missing its father, is clearly a threat. However, in contrast, Bauerle's comment was construed as an actual threat to Crosby. Falkena received only a written warning and an EAP referral. There was no evidence that additional threats were made, or that Falkena persisted in making threats as Bauerle had.

Regarding the 2-day suspension given to Rivera, her statement to Langer was correctly interpreted as "threatening in nature." However, it was not the kind of direct threat made by Bauerle. In addition, the General Counsel's argument that Rivera should have been discharged since she received three prior verbal warnings is rejected since the prior warnings were for taking extended breaks, and not for engaging in threatening conduct.

Chapman's comment that she would have James take care of the electricians was viewed by Respondent as violating its corporate violence policy, and it was also noted that she had conflicts with coworkers. However, her conduct did not involve the type of direct threats made by Bauerle.

In sum, the threats set forth above did not equal the severity of conduct engaged in by Bauerle. Nor were they accompanied by the kind of insubordination and persistence with which Bauerle continued the confrontation after being told to stop.

Conclusions Regarding Bauerle

I find that the General Counsel has made a showing that Bauerle's discharge was motivated by his union activities. *Wright Line*, supra. Thus, Respondent possessed knowledge of his union activities during the 1994 campaign. Evidence of animus toward the Union was set forth above in the section

regarding Wilson, and additional evidence of animus was established in Bauerle being told by Tomlins to "watch [his] back since he could not change Bauerle's mind concerning the need for a Union. In addition, Bauerle adamantly insisted that he would vote for the Union, even after Plant Manager Bhalla asked what he could do to change Bauerle's mind.

However, I conclude that Respondent has met its burden of proving that it would have discharged Bauerle even in the absence of his union activities. *Wright Line*, supra.

I cannot find that Respondent acted improperly in discharging Bauerle. Bauerle contributed to the escalation of the confrontation with Crosby by writing demeaning messages on the PLM, and then invited Crosby to meet him after work and threatened to beat him. When Tomlins told him to stop his conduct, or he would be in big trouble he persisted, by resuming the confrontation. Bauerle concedes that he was warned once to cease contact with Crosby. Tomlins stated that he told him twice to do so, and that after the second time, he was told by Crosby that Bauerle invited him to meet him outside. Thereafter, Crosby complained that he had been threatened with being shot.

Tomlins, who recommended Bauerle's discharge, was entitled to rely upon Crosby's consistent statements, repeated to him, and to Danforth, and contained in his written statement, that he had been threatened with being beaten and with being shot by Bauerle. Although Bauerle denied making the threats, he admitted to Tomlins that he had asked Crosby to meet him after work. Tomlins was further justified in concluding that Bauerle's insubordination in not following his direct order to cease any interaction with Crosby, combined with the threats to Crosby warranted discharge.

I have considered the facts that Bauerle denied having threatened Crosby, and told Danforth that his gesture to his forehead indicated Bhalla. However, Crosby told Danforth and Tomlins that Bauerle had directly told him that his gesture meant that he would put a bullet between his eyes. Respondent's officials were entitled to credit Crosby, and they did. The question is whether Respondent had a reasonable basis to believe that the threat had been made. *American Thread Co.*, 270 NLRB 526, 532 (1984). Although I cannot find any way in which Bauerle's story changed, as testified by Tomlins, nevertheless Tomlins was entitled to credit Crosby over Bauerle. Tomlins gave a proper reason for believing Crosby—his story was consistent after being repeated several times. In addition, Tomlins was involved with the incident almost from the beginning and properly determined who he could believe.

I reject the General Counsel's argument that no proper investigation had been done. The facts became known to Tomlins immediately. Both Bauerle and Crosby involved him in the altercation as it was developing. Tomlins properly received complainant Crosby's version of the threat to kill, and then when Danforth arrived, they spoke to Bauerle. It was not improper for Tomlins to have formed an opinion immediately, as testified by Danforth, that he believed Crosby and recommended Bauerle's discharge, even before Bauerle was interviewed. As the first-line supervisor, the person on the scene, and the individual who was made aware of the progress of the incident, Tomlins could properly and immediately assess the credibility of both men as to the incident and the allegations, and make a recommendation based upon those factors.

The fact that Crosby told Tomlins that he did not want Bauerle discharged for this incident is of no moment. Respondent

properly exercised its judgment in proceeding with termination for these events.

Respondent's corporate violence policy was properly implemented here. That policy provides that serious misconduct, such as threats of physical violence, is not subject to progressive discipline, but may cause the employee to be subject to immediate discipline, up to and including termination. I cannot find, based upon a review of the conduct engaged in by other employees alleged by the General Counsel, that actual threats, insubordinate conduct, and persistence in continuing a confrontation of the nature engaged in by Bauerle were tolerated by Respondent.

I accordingly find that Respondent has met its *Wright Line* burden of proving that it would have discharged Bauerle even in the absence of his union activities.

E. Peter Murray

Murray was employed from March 1989 to October 1995 as a production technician, and at the time of his discharge was a printer operator. In June 1994, Rodney Fain, Respondent's senior administrative manager, wrote a letter of reference in behalf of Murray, in which he stated that during his employment, Murray has been a "valuable member of our organization. His job performance and attendance prove Pete to be a very dependable employee." His April 1995 performance evaluation listed performance in the standard to good range, and noted that he was "actively involved" and has "many good ideas" concerning improving operations. Tomlins said he wanted Murray to become active in the Newburgh Action Team, an employee-employer group which addresses plant issues.

As set forth above, he was active in the 1994 union campaign by soliciting cards for the Union, distributing union literature, wearing union clothing, and attending union meetings. He stated that of the 30 or 35 employees on his shift, 8 or 10 of them wore union clothing. He and coworker Nick Orlando were union committee members. Murray's supervisor, Tomlins, testified that he saw him wearing a union hat, and was aware that he was involved in the Union's 1994 effort to organize the plant. However, Tomlins was not aware of Murray's 1995 union activity.

Murray stated that during a meeting called by Respondent to discuss the union campaign, Manager John Auer told the employees that signing a union card meant that the Union was authorized to represent them. Murray asked Auer whether that authorization was written on the card, and Auer said he did not know since he had never seen a card. Murray stood, and handed Auer a card and asked him to look at it. Auer refused to accept it.

Murray testified that prior to the election, he criticized Plant Manager Bhalla and complained that he (Bhalla) had told an employee that she could lose her job as a temporary employee if the Union was selected in the election. Murray also asked Bhalla five or six times at one meeting if "jobs were negotiable" if the Union organized the plant. Bhalla refused to answer him.

Following the Union's election loss, and in the summer and fall of 1995, Murray solicited cards from employees in the breakroom, and offsite. He stated that during a meeting called by management in September, he told Auer that he believed that there was a "good possibility" that he could be discharged because Bauerle and Wilson had been fired. Murray also ad-

vised Auer that he (Auer) must be aware that another campaign to organize the Union was then underway, and said that employees had approached him asking for cards, and that he distributed some cards. Auer told him that he was not aware of union activity, and that he should not be afraid of losing his job because he would not be discharged for his union activities.

Auer testified that during that conversation, Murray told him that he believed that he was being "scrutinized" at work, and requested a meeting with Plant Manager Bhalla. Auer arranged that meeting. Danforth testified that Auer told her that Murray mentioned that he believed that he was being "singled out" because of his union involvement.

Murray stated that following the discharges of Bauerle and Wilson, Quality Control Manager Greg Giaquinto approached him and said, "[Y]ou are still here," and several times gestured to him that "you are out of here."

1. Prior discipline

In late June 1995, Murray noticed a defect in a plate on his press, and asked his team leader if he should change the plate. The team leader told him to change the plate. Murray said that ordinarily the team leader gets the plate and installs it, but at that time the leader was busy so Murray obtained the plate. Murray went to the office, looked at the schedule, wrote down what he believed to be the correct number of the plate he was running, and selected what he believed to be the correct plate.

The plate chosen by Murray was the wrong one. The one he selected had the wrong UPC number. With help from a floater, Murray installed the plate on the press and ran the job, which consisted of printing the UPC (universal product code) number on cans of soda. The error was not caught until five work shifts later, by which time 2 million cans had been run with the wrong code. All cans in the total run comprising 8 million were segregated in a HFI (hold for inspection) area awaiting a determination as to their resolution.⁷

Plant Manager Bhalla wrote a memo to his superior, Company President Engelhuber, which noted that the cause of the problem was operator error. Bhalla noted that in order to prevent a reoccurrence, a procedure had been implemented whereby the plate numbers are checked by two employees. Bhalla recommended that the plate numbering system be changed so that the numbers are easily recognizable. Bhalla advised that he was attempting to have the cans packaged in multipacks (with the UPC on the cardboard wrap so that the defective cans' UPC number would be concealed from a store's cash register scanner), and one filling location has agreed to do so which would account for 90 of the 654 pallets which were in HFI. Bhalla did "not expect any issues with the remaining inventory."

Bhalla testified that this error was costly for Respondent which had to hold the inventory of cans for a longer period of time because the customers could not purchase the product. He stated that all the cans were eventually sold.

Bhalla stated that if an error occurs on the production line, and an employee was working in conjunction with a floater, both are held accountable for the error. He also testified that when the shift changes, the team leader is responsible for checking the UPC codes on the cans. However, he checks to

⁷ One in every four cans run was defective since a total of four plates were run on two printers, and only one of the plates was incorrect. Thus, it was impossible to segregate the defective cans since they all emerged from the printers and went to one location.

make certain that the UPC is readable, not that it is the correct code. He stated that although the wrong UPC number was run on subsequent shifts following Murray's, he did not discipline them because they are not obligated to read or check the plate number. The person who changes the plate is responsible to ensure that the plate with the correct UPC number is installed on the press. In addition, Danforth and Tomlins stated that the floater was not disciplined since, even if the floater helped install the plate, the floater could not know that the plate bore the incorrect UPC code. That fact was not obvious from the plate itself, and the floater therefore bore no responsibility for Murray's error of selecting the wrong plate.

Murray was issued a written warning for "operator negligence resulting in excessive product defect." The warning stated that "any similar occurrences will result in further discipline, up to and including termination."

On September 14, 1995, Murray produced three consecutive HFI's at one time, and later in the shift two others. The HFI's were due to the cans not having color on them. Murray attributed the problem to inconsistency in the ink's viscosity, and the "extra effort" needed in cleaning and housekeeping due to an upcoming visit by August Busch. He received a 1-day decision making leave (suspension) because of the HFI's. The memo confirming the suspension noted that the cause of the problem was that Murray had not kept the fountain filled with ink. The memo made reference to the June 30 error involving the wrong plate.

The memo further noted that due to Murray's "continuation of poor work performance" he was receiving the next step in the disciplinary process—the decision making leave—which is a one day suspension.

The next incident involving Murray's work performance occurred 1 month later.

Murray stated that on October 13 his work resulted in four or five HFI's. He was off from work for a few days, and received a phone call informing him that he was discharged. A memo dated October 19 states that he was terminated for "continued poor performance in the area of quality." The letter made reference to his work on October 13 which "resulted in poor quality cans produced."

A company memo from Tomlins to Danforth dated October 14 states that Murray produced a total of 12 pallets of HFI's for three different products, consisting of deco voids, which are missing ink color on a can, or the ink is overlapping; failure to check the cans; and missing ink. The memo stated that Murray had received a written warning and a 1-day suspension previously for the same issues of poor quality performance, and his continued performance requires termination. Specifically, the memo mentions three areas in which Murray's performance was deficient that day.

The first involved a case where five pallets of cans were produced without any green ink and cans produced with a deco void, and Tomlins concluded that Murray failed to properly check the cans he produced. The second involved another situation in which Murray failed to check the cans after changing a plate, with a result that the same error which occurred before the plate was changed continued afterwards. The final problem was where an ink key on the printer was closed, preventing the cans from receiving ink in one area, which defect was not noticed by Murray until he was informed that the cans were defective.

I reject the General Counsel's assertion that one of those instances occurred during Murray's break in which case he would not be responsible for errors. Tomlins was not aware of when Murray took a break on October 13. He only testified that assuming Murray's break was at 3.30 p.m., he would not have been held accountable for the errors which occurred at that time.

Bhalla stated that Respondent has a rule that requires the printer operator to check cans every 15 minutes at least, which would be about a run consisting of five pallets. One pallet contains about 8000 cans. The reasoning is that discipline is generally issued for an HFI of more than five pallets, since it is then assumed that the operator was not checking the cans every 15 minutes. However, Bhalla stated that too many patterns of HFI's may result in discipline even if there are not five consecutive pallets. He specifically stated that if the operator has less than five pallets of HFI, but it is a repeated occurrence, discipline could be issued.

Tomlins stated that HFI's are not uncommon, but it is unusual for an operator to have a number of HFI's which repeat themselves within the same production period. Murray's offense when compared to others with HFI's, was that Murray gave less attention to detail than the other employees did, and the HFI's were repeated HFI's of the same nature on the same shift.

Bhalla testified that Tomlins recommended Murray's discharge, and he reviewed the facts and background data and agreed. During those discussions, there was no mention of Murray's union activity.

In October 1994, Danforth issued a memo with a revised "Issue Resolution" form. The form was issued "in direct response to the growing number of HFI's . . . and the inability to capture and identify the root cause of each defect." The purpose of the form is to identify the problem, set forth the cause of the HFI, mechanical or human error, and the corrective action taken. The memo states that if an employee accumulates repeated instances of HFI's as set forth in the forms, action taken will include additional training, rotation, reclassification, recognition, or disciplinary action.

Employee Connolly testified that HFI's are a common, daily occurrence. In addition, the Issue Resolution forms received in evidence indicate that HFI's occur frequently.

2. The alleged disparate treatment toward Murray

The General Counsel cites two incidents which allegedly demonstrate that Murray was disciplined inappropriately for selecting the wrong plate. In those two instances, the floaters who worked with the printer operator were disciplined for the operator's wrongdoing. The General Counsel reasons that since the floater with whom Murray worked was not disciplined, this shows that Murray was singled out for discipline because of Respondent's desire to terminate him. I do not agree.

The first incident occurred in March 1994, in which Tomlins issued an incident report, criticizing the floater for failing to notice that a ductor roll was not turned on, a "simple, normal and little thing" that is a routine part of operating the press. Tomlins stated that "as a floater you are the check gap for the operators." It is clear that the floater's responsibility was to make sure that obvious, readily observable procedures are followed unlike the situation in which Murray's selection of the wrong plate could not be discovered, and was not expected to be checked by the floater.

The second incident occurred in March 1996, following Murray's discharge. In that case, floater Harvey Cole was in charge of a changeover, and the printer operator selected the wrong plate. Tomlins' written warning to Cole noted that "we have checks to ensure this does not happen, you were the check in the procedure and you did not perform this task." It further advised Cole that his "job was to verify the plate numbers to the schedule and cross check the person who pulled the plates."

The General Counsel argues that this incident occurred before Respondent changed its procedures to require that two people verify the plate number, citing a standard operating procedure (SOP) with an issue date of November 21, 1996, concerning plate change procedure. However, this SOP does not deal exclusively with the verification process, but relates to the entire plate change process. It is unlikely that it would have taken 17 months following the Murray incident to have issued such a procedure. This is especially so since Bhalla's memo to official Engelhuber, dated July 7, 1995, relating to the Murray incident states that "internally we have instituted a procedure for double checking plate numbers by 2 team members for any plate changes." Accordingly, Cole's failure to check the plate numbers occurred after the change in the SOP requiring the floater to do so. Indeed, Cole's written warning stated that his failure to check the numbers violated the checks, and his job responsibilities.

I therefore find that Respondent's failure to discipline a floater for failing to check the plate numbers on Murray's new plate is not evidence of disparate treatment toward Murray.

The General Counsel cites as evidence that Murray was treated disparately, an instance involving shipping department employee Marc Conklin. On May 15, 1995, he was given a written warning for poor work performance. It was noted that Conklin caused damage to product which was shipped to customers on at least two occasions in May. On June 20, Conklin was suspended for 1 day for continued poor work performance. I do not believe that the work performance of a shipping department employee can be appropriately compared to a printer operator. Inattention by a printer operator is extremely costly to Respondent since an error can result in millions of defective products being produced in a short period of time.

The General Counsel further argues that Respondent's tolerance of Warren Crosby constitutes evidence of disparate treatment toward Murray. On March 17, 1995, Crosby received a 3-day suspension for misuse of the PLM involving the incident with Bauerle. On July 18, Crosby and eight coworkers were given a formal counseling for alleged misuse of the plm. Tomlins noted in the written counseling that this discipline was administered to all employees in their work area since no one was willing to admit writing the messages. On July 21, Crosby admitted being the author of certain improper PLM comments. Crosby was suspended pending the outcome of the investigation of the "latest PLM issue." It was noted in the suspension notice that he recently had disciplinary issues involving the PLM, and had continued to disregard and failed to comply with the directives of his superintendent. On August 8, Crosby was terminated. The termination letter noted that on August 2 he returned from a 5-day suspension and signed a letter of commitment in which he agreed to follow company directives and policies. Following his return there were "several incidents in which he violated those commitments." He was terminated for continuing to fail to follow company directives and policies.

The General Counsel points to the fact that Crosby was not discharged following his first offense following his letter of commitment whereas Murray was terminated following his first offense following his decision making leave. The only evidence on this point is that Crosby's termination letter noted that "several incidents" of PLM abuse occurred before the discharge. There was no proof, however, that management became aware, after each such incident, that it had occurred, and that it failed to discharge him upon notification of the first alleged abuse of the PLM. Rather, it may have been the case that all the renewed PLM abuse occurred at one time, based upon which Crosby was terminated.

It certainly cannot be said that in this case, Respondent tolerated continued wrongdoing after the final step in the progressive discipline system, decision making leave, had been completed.

With respect to HFI's, the evidence establishes that HFI's occur frequently, often in larger numbers than the amount Murray produced which resulted in his discharge. Nevertheless, the recommendation for his termination was legitimately based upon his "continued poor performance in the area of quality" and that Tomlins properly concluded that Murray had repeated HFI's in the same production period which were due solely to operator error.

Conclusions Regarding Murray

I find that the General Counsel has made a showing that Bauerle's discharge was motivated by his union activities. *Wright Line*, supra. Thus, Respondent possessed knowledge of his union activities during the 1994 campaign. In addition, Murray publicly contradicted and challenged managers Auer and Bhalla regarding their belief, respectively, that a union card authorizes the Union to represent employees, and whether jobs were negotiable in the event of a union victory. Evidence of animus toward the Union was set forth above in the section regarding Wilson, and additional evidence of animus was established in Murray's testimony that Manager Giaquinto told him, following the discharges of Bauerle and Wilson that he was "still here" and gestured that he was "out of here."

However, I conclude that Respondent has met its burden of proving that it would have discharged Murray even in the absence of his union activities. *Wright Line*, supra.

I cannot find that Respondent acted improperly in discharging Murray. In June 1995, Murray was issued a warning for operator negligence resulting in excessive product defect—the 2 million can run which was caused by the wrong plate being selected. In September, Murray produced five HFI's in one shift, all caused, according to Respondent, by Murray's error in not keeping the fountain filled with ink. No credible evidence has been produced that that was not the cause of the HFI's. As a result of those errors, he received a decision making leave. Only 1 month later, Murray produced, according to him, 4 or 5 HFI's, but according to Respondent's records, 12 HFI's for three different products in 1 day. Errors made that day consisted of failing to check the cans, thereby failing to notice defective cans due to lack of ink, one ink bleeding onto another, and failing to open an ink key, producing cans without ink.

I accordingly find and conclude that Respondent was justified in discharging Murray. I cannot find any evidence of disparate treatment or that Respondent has tolerated poor performance of the nature involved here.

I therefore find that Respondent has met its burden of proving that it would have discharged Murray even in the absence of his union activities. *Wright Line*, supra.

CONCLUSION OF LAW

By discharging Steve Wilson on or about March 14, 1995, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Metal Container Corporation, New Windsor, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Steelworkers of America, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Steve Wilson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Steve Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Steve Wilson in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New Windsor, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided

by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the United Steelworkers of America, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Steve Wilson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steve Wilson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL make Steve Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Steve Wilson, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

METAL CONTAINER CORPORATION

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United

States Court of Appeals Enforcing an Order of the National Labor Relations Board."